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Supreme Court of the United States.

No. 206.—October, Term, 1902.

The Chattanooga National Building and Loan Association, Petitioner, *vs.* William H. Denson and Rosa E. Denson, Respondents.

Brief of Oscar W. Underwood and W. H. Denson.

STATEMENT OF THE CASE.

This case comes before this court on a writ of certiorari at the instance of the said Building and Loan Association, to the United States Circuit Court of Appeals, for the Fifth Judicial Circuit, to review a judgment of that court pronounced against the petitioner, and in favor of respondents here.

The point of contention is, the petitioner was a foreign corporation to the State of Alabama, chartered and organized under the statutes of Tennessee as a Building and Loan Association. The transaction as evidenced by the note and mortgage, the basis of the action, and the other evidence in the case, is that of a loan by a building and loan association.

In the ninth paragraph of their answer to the bill, the respondents insist, as a full and complete defense to the matter set forth in the bill, that the said cause of action grew out of the petitioners engaging in or transacting business in Alabama, it being a foreign corporation, without first complying with the conditions imposed by the laws of

Alabama upon foreign corporations to enable them to engage in or transact any business within the said State.

The Circuit Court of Appeals sustained this defense of the respondents, denied the relief prayed for in petitioner's bill and ordered the lower court to dismiss the same.

This is the only point of contention in this litigation and the only question this court is asked to review.

THE CONSTITUTION AND STATUTES OF ALABAMA APPLICABLE TO THIS CASE.

Article 14, Section 4 of the Constitution of Alabama, 1875, in operation at the time this transaction took place, reads as follows:

"No Foreign Corporation shall do any Business in this State Without Having at Least one Known Place of Business and an Authorized Agent or Agents Therein."

Section 232 of the present Constitution, 1901, of Alabama employs the identical and same language.

The Act of the Legislature approved 28th of February, 1887, (see session acts 1886–87, page 102) and which is now embraced in sections 1316, 1317, 1318, 1319 and 1320 of the Code of 1896 of Alabama, reads as follows:

"1316. Foreign Corporation must file Instrument of Writing Designating Agent and Place of Business in this State.—Every Corporation not Organized Under the Laws of this State shall, before Engaging in or Transacting any Business in this State, file an Instrument of writing, under the Seal of the Corporation and Signed Officially by the President and Secretary thereof, Designating at Least one Known Place of Business in this State and an Authorized Agent or Agents Residing Thereat; and when any such Corporation shall Abandon or Change its Place of Business as Designated in such Instrument, or shall Substitute Another Agent or Agents for the Agent or Agents Designated in such Instrument of Writing, such Corporation shall file a new Instrument of

WRITING AS HEREIN PROVIDED, BEFORE TRANSACTING ANY FURTHER BUSINESS IN THIS STATE."

"1317. WHERE FILED.—SUCH INSTRUMENT, WHEN FILED BY ANY CORPORATION ENGAGED IN ANY BUSINESS OF INSURANCE, MUST BE FILED IN THE OFFICE OF THE STATE AUDITOR, AND WHEN FILED BY A CORPORATION ENGAGED IN OTHER BUSINESS THAN THAT OF INSURANCE, MUST BE FILED IN THE OFFICE OF THE SECRETARY OF STATE."

1318. UNLAWFUL FOR FOREIGN CORPORATION TO TRANSACT BUSINESS IN THIS STATE BEFORE DECLARATION IS FILED; PENALTY.—IT IS UNLAWFUL FOR ANY CORPORATION TO ENGAGE IN OR TRANSACT ANY BUSINESS IN THIS STATE BEFORE FILING THE TWO WRITTEN INSTRUMENTS PROVIDED FOR IN THE TWO PRECEDING SECTIONS; AND ANY SUCH CORPORATION THAT ENGAGES IN OR TRANSACTS ANY BUSINESS IN THIS STATE WITHOUT COMPLYING WITH THE PROVISIONS OF THE TWO PRECEDING SECTIONS SHALL, FOR EACH OFFENSE, FORFEIT AND PAY TO THE STATE THE SUM OF ONE THOUSAND DOLLARS."

"1319. UNLAWFUL TO ACT AS AGENT OF FOREIGN CORPORATION BEFORE SUCH DECLARATION IS FILED; PENALTY.—IT IS UNLAWFUL FOR ANY PERSON TO ACT AS AGENT OR TRANSACT ANY BUSINESS, DIRECTLY OR INDIRECTLY, IN THIS STATE, FOR OR ON BEHALF OF ANY FOREIGN CORPORATION WHICH HAS NOT DESIGNATED A KNOWN PLACE OF BUSINESS IN THIS STATE AND AN AUTHORIZED AGENT OR AGENTS RESIDING THEREAT, AS REQUIRED IN THIS ARTICLE; AND ANY PERSON SO DOING SHALL, FOR EACH OFFENSE, FORFEIT AND PAY TO THE STATE THE SUM OF FIVE HUNDRED DOLLARS."

"1320. SOLICITOR MUST ENFORCE PENALTIES; COMMISSIONS.—EVERY PENALTY PROVIDED FOR IN THIS ARTICLE SHALL BE SUED FOR AND RECOVERED IN THE NAME OF THE STATE OF ALABAMA, BY THE SOLICITOR OF THE CIRCUIT OR COUNTY IN WHICH THE OFFENSE IS COMMITTED, MUST BE PAID BY THE SOLICITOR INTO THE STATE TREASURY FOR THE USE OF THE STATE, LESS TWENTY-FIVE PER CENT. TO BE RETAINED BY SUCH SOLICITOR FOR HIS SERVICES. THE ATTORNEY-GENERAL SHALL REPRESENT THE STATE IN SUCH ACTIONS

CARRIED TO THE SUPREME COURT, AND FOR HIS SERVICES THEREIN IS ENTITLED TO ONE-HALF THE COMMISSIONS HEREIN ALLOWED TO THE SOLICITOR."

ARGUMENT ON LAW AND FACTS.

The Supreme Court of Alabama has decided the laws under consideration are a legitimate exercise of the police power of the State, and are police regulations; that such laws are *prohibitory* to foreign corporations doing business in Alabama without first complying with the provisions of said laws.

Am. Un. Tel. Co. vs Wes. Un. Tel. Co. 67 Ala. 26 et seq.; Dudley vs. Collier et al 87 Ala. 431-432.

To constitute "engaging in or transacting any business in this State" within the meaning of said laws, the Supreme Court declare, "there must be a doing of some of the works, or an exercise of some of the functions, for which the corporation was created."

Beard vs. U. & A. Pub. Co., 71 Ala., 60-62; Sullivan vs. Sullivan Timb. Co. 103 Ala. 371-380——State vs. Bank 108 Ala. 3-6; Farrior vs: Mortgage Co. 88 Ala. 275-279; Association vs. W. H. Denson, page 71 Transcript in this case.

The caption of the bill and the first paragraph thereof show the petitioner is a foreign corporation chartered and organized under the laws of Tennessee, and principal office at Chattanooga, "*and that it is authorized and empowered by its charter to lend its funds to its stockholders on such terms and conditions and in such manner and under such regulations as may be prescribed by its constitution and by-laws, such loans to be secured by real estate.*"

Transcript p. 7½

It is indisputable that the lending of its funds to its stockholders and securing the same by real estate is the doing of some of the works, and an exercise of some of the functions of the Association to do which it was created and organized.

No person could obtain a loan, and the Association had

no power to make a loan to any one unless he was a stockholder therein.

Becoming a stockholder was the foundation upon which the whole transaction rested, and without which there could be no loan, as the charter inhibited a loan to all persons except a stockholder.

It would be a solecism to say there is a corporation but it has no stockholders; and the very business, the functions, the works the Association was created and organized to do was to secure stockholders. It could not carry on its business only as it would secure a stockholder, and its whole business was with its stockholders and none others.

It is one of the works and functions of a corporation, particularly a building and loan Association, owing to its peculiar business, and the means and mode by which its business is secured and carried on, to appoint and have agents, a corporation can carry its business only through agents.

Where and how did the Association secure the subscription for the stock that was to make a person a stockholder in said Association?

Let the Association through its Secretary tell:

"*The loan to defendant Denson involved in this suit was negotiated by one F. H. Kennedy, of Fort Payne, Ala., who was a traveling soliciting agent for the complainant, and whose business it was to solicit subscriptions to stock and to submit applications for loans from complainant. The application of defendant Denson for stock in complainant Association was forwarded by said soliciting agent to the home office of complainant in Chattanooga, Tenn., and the stock was duly issued and returned to said agent to be by him delivered to defendant Denson.*"

Transcript p. 20.

On this point Denson testifies: "*All the negotiations were commenced and consummated in Gadsden, Alabama and nowhere else. He never had any interview or communication with the Association at any time or place, only such as he had with the agents of the Association in Gadsden,*

Alabama. The said agent came into Denson's office in Gadsden and represented himself to be the soliciting agent for the complainant in this case. He said he understood that Denson was desirous of borrowing money, who informed him such was his desire. He said the complainant would lend to Denson at six per cent. per annum, with seven years within which to pay it, with twice the value on a real estate mortgage to secure it, which real estate should be appraised by two disinterested persons to be selected by the Association. Denson accepted the terms. Said person then presented the original of exhibit A to this deposition."

NOTE.—Exhibit is exhibit 2 on page 45 of Transcript.

Denson signed and executed said original instrument (Exhibit A is exhibit 2 supra) *on 25th of April*, 1895. *Each of the original instruments were each signed, executed, acknowledged before an officer in Alabama and delivered to the said soliciting agent of the complainant Association by me in my office in Gadsden, Etowah County, Alabama. The land described and embraced in the said mortgage is situated in the city of Gadsden, Etowah County, Alabama."*

Transcript pp. 29, 30, 31, 32.

Certainly it was an exercise of the functions and doing some of the works for which the Association was created and organized to do, when it appointed this agent, whose business it was to solicit subscription to stock and submit applications for loans from said complainant.

He was authorized and empowered to do these things in Alabama. The said agent was a resident of Alabama. He did solicit the subscription for stock and the application for the loan in Alabama, and he did secure the same in Alabama, and the same were signed by Denson in Alabama and delivered by him to said agent in Alabama, and the same were forwarded to the home office in Chattanooga. When these instruments were delivered to the agent in Alabama, they were then and there delivered to the Association, as this was his business as shown by the evidence. He was the agent of the Association, and was not the agent

of Denson. It is true Denson was dealing in Alabama with the Association through its agent in Alabama.

The fact the agent had to forward the same to Chattanooga does not show the Association did not receive them in Alabama, and was not doing business in Alabama within the meaning of said laws of Alabama. When Denson delivered the papers in Alabama to said agent there had been done in Alabama an essential thing; there had transpired in Alabama an essential fact, which was necessary and essential for the Association to carry on the work, or some part thereof, and to exercise the functions for which the Association was created and organized. Denson could not become a stockholder unless he subscribed for stock; he could not procure a loan unless he made an application therefor. To accomplish this the Association had two sets of agents, an agent in Alabama to work up business and the home office in Chattanooga to conclude said business. The home office could not conclude or perfect business unless it had business to act on. It received such business from and through its agent in Alabama, appointed for such purpose. Denson did not deal with the Association in Tennessee; he dealt with it in Alabama, through its agent in Alabama. That agent sent the applications to his principal at Chattanooga, who issued the stock and returned it *to said agent to be by him delivered to said Denson in Alabama.* Here is an agent appointed to secure applications for stock in Alabama, and to receive the stock in Alabama issued on such applications and to deliver the same in Alabama to the applicants. This agent had all the authority in Alabama to solicit business in Alabama for the Association, as the Association could exercise in Tennessee. And this business, as we have before stated, is the essential of all business of the Association and without which it could do no business.

We have seen in the testimony of Johnson, "*that the loan in this case was negotiated by F. H. Kennedy of Ft. Payne, Ala. * * The original application and bid of said Denson for the loan in controversy in this case was also*

*forwarded to complainant's home-office by said Kennedy, and was submitted along with other applications to complainant's Board of Directors at a stated meeting of the same. * * Said application was granted and the loan was directed to be made. * * Thereupon the note and deed of trust filed as exhibits to complainant's original bill in this cause, were prepared at the home-office of complainant Association and forwarded to said Kennedy, through whom the application had been submitted. At the same time a check was sent by complainant Association, on the Chattanooga National Bank of Tennessee, in favor of defendant, W. H. Denson, for the sum of $2,367.50 to D. P. Goodhue, of Gadsden, Ala., with instructions to said Goodhue to deliver said check to defendant upon the execution and delivery of said note and deed of trust. Complainant at that time had no money on deposit in any bank in the city of Gadsden, or the State of Alabama, and said check was subsequently presented for payment at the Chattanooga National Bank in the city of Chattanooga, Tenn., and was paid by said bank out of funds on deposit therein belonging to complainant Association.*"

Transcript pp. 20, 21.

Denson testifies:

"*The note and mortgage were delivered in Gadsden by the said agent to Denson, who executed the same and delivered them in Gadsden to said agent, and upon said delivery of the same, the said agent delivered to Denson, in Gadsden, the said check for the amount of said loan.*"

Transcript pp. 29, 30, 31, 32.

"*When Denson delivered to said agent the note and mortgage, the agent in Denson's office in Gadsden, Alabama, delivered to Denson the check for the amount of the loan, and he told Denson, at the time, to present it to the First National Bank of Gadsden, and he would receive the money on it. Denson presented the check at the Gadsden bank and the cashier, W. G. Brockway, paid him the money on it.*"

Transcript pp. 33, 34, 38, 39, 40.

"*The said check was not sent by Denson, or by his au-*

thority, or for his use or benefit, to the Chattanooga bank, or any other bank, for collection. He had no interest whatever in the check after the money was paid him on it."

Transcript p. 39.

"Brockway, the cashier of the Gadsden bank, swears he paid the money on this check under an understanding with the association, that the said Chattanooga bank, on which it was drawn, would pay the same on presentation. After such payment by Brockway, he transmitted the check to his bank's correspondent at Chattanooga and the same was paid. The stamp "For Collection," was not placed on said check to indicate that it was to be collected from the Chattanooga bank on account of W. H. Denson; but the money was paid Denson as on any other negotiable exchange."

Transcript p. 51.

"The Association made three other separate and distinct loans in Gadsden to residents of that place, besides that made to Denson, and under the same terms and conditions, and in the same mode and manner, as that made to Denson, to-wit: One 16th of May, 1895; one 30th of May, 1895, and one 1st of June, 1895."

Transcript pp. 38.

The certificate of the Secretary of State for Alabama shows, at the time the loan to Denson was made, and the three others named, the Association had not complied with the laws of Alabama, hereinbefore mentioned, prescribing the conditions under which foreign corporations can engage in or transact any business in Alabama.

Transcript pp. 52.

The testimony shows the Association employed two persons, residents of Gadsden, to appraise the value of the real estate Denson mortgaged to the Association to secure the loan and their appraisement is upon the application for the loan. The Association also employed Goodhue & Sibert, attorneys at Gadsden, to examine and report on the

title to the real estate, which they did on 10th of May, 1895. Transcript pp. 50, 51.

The foregoing is all the evidence material to determine the case.

The testimony in the case shows, without dispute, that the Board of Directors of the complainant directed the loan to be made. Thereupon the note and mortgage, the basis of this litigation, were prepared at the home office and forwarded to the said Kennedy, "*through whom the application had been submitted.*" At the same time a check was sent to D. P. Goodhue, of Gadsden, Ala., "*with instructions to said Goodhue to deliver said check to said Denson upon the execution and delivery of said note and deed of trust.*"

In addition to this, the Association had made arrangements with the Gadsden bank to pay said check, and said bank did pay said check under said arrangements with the Association upon presentation of same by Denson; and said agent directed Denson to present said check at said bank and it would be paid,

Had Denson not executed and delivered said papers, the check would not have been delivered to him.

It is impossible to conceive what other acts or functions the Association could do to carry out and transact the business it was created and organized to do, to make this loan than was done by it in Alabama.

Such instructions to the agent in Alabama, accompanying the transmission of the papers to him, constituted said agent, *pro vice*, as fully the representative of the Association to act for it in Alabama, and to perfect and conclude said loan in Alabama as the home office in Chattanooga had the power to do, had Denson applied in Chattanooga in person and there executed and delivered the papers and there received from said office the said check on the Chattanooga bank.

The agent at Gadsden was clothed with authority to demand of Denson its execution and delivery of the papers to him in Gadsden and he was authorized to accept the de-

livery of said papers in Gadsden from Denson and to deliver the check to Denson and to inform him the Gadsden bank would pay the check on presentation.

The execution and delivery of the note and mortgage to the agent was to be and actually was, concurrent and simultaneous with the delivery of the check to Denson, one was the consideration for the other, and all this took place in Alabama. Denson could not execute the mortgage without calling into operation the laws of Alabama and an Alabama officer. The Association knew Denson could demand the cash upon the execution and delivery of the note and mortgage. He was not borrowing the Association's check or its credit. He was borrowing its cash, hence it made the arrangement with the Gadsden bank to cash the check over its counter in Gadsden when the same should be presented.

The seat of operations and the authority to make and conclude said loan was removed by express authority of the Association from Tennessee to Alabama, and the agent in Alabama was clothed with all the authority to make and perfect this loan in Alabama as the home office had power to make in Tennessee, it could have done no more to this end in Tennessee than it did in Alabama.

It never signified to Denson it would make the loan, only when the said agent presented said papers to Denson for him to execute and deliver to said agent in Gadsden.

The fact the note is dated "*Chattanooga*," when the evidence shows it was executed and delivered in Alabama, and the money, the consideration for said note, was paid Denson in Alabama, and the fact the note recites it is made "*payable at the home office in Chattanooga, Tennessee*," when the evidence shows every payment by Denson was made in Gadsden, Ala., to the agent there appointed by the Association to receive it, and the further recital in the note and mortgage that they are executed "*under and with reference to the laws of Tennessee*" are not sufficient, all combined, to defeat the policy of the Constitution and Statutes of Alabama prohibiting foreign corporations from doing business

in Alabama without a compliance of said laws. The following cases are directly in point:

New York Life Ins. Co. vs. Cravens, 178 U. S. 389, 395, 398, 399.
Equitable Life Ins. Co. vs. Clements, 140 U. S. 226 234.

The Alabama cases cited in the opinion of the Circuit Court of Appeals declare:

"*Under the Constitution and the Statute a single act of business done, without complying with the prescribed conditions, is a violation of both; there need not be a carrying on of business. The loan of money here and the taking here of notes and mortgage to secure repayment, the mortgage being on land situated in this State, is the doing of business here within both the Constitution and the Statutes. And the facts that the notes and mortgage are executed here, though they may be payable elsewhere, and the land embraced in this mortgage is situated here, are sufficient to show prima facie that the transaction involves the doing of business by the lender and mortgagee in the State of Alabama.*

State vs. Bristol Bank, 108 Ala. 6.
Farrier vs. New England Co., 88 Ala. 275, 278, 279.
Mullens vs. Am. Freehold & C. Co., 88 Ala. 280.
Sullivan vs. Sheehan, 89 Fed. Rep. 349.

The case at bar is much stronger to show a "*doing business*" in Alabama than any of the cases cited.

In order that the said laws of Alabama should be brought into operation, and nullify this transaction it is not necessary to show *a contract was concluded in Alabama, nor under the laws of which State is the contract of loan to be construed, nor in what place was the money loaned to be repaid.*

The prohibition embraces not only contracts, but includes all acts, etc., transactions the doing of which is the exercise of some of the functions or the doing of some of the works for which the corporation was created and organized.

If the acts done in Alabama in this case do not constitute a contract, yet such acts as were done in Alabama, were such acts as are essential to constitute any contract

of loan and make it binding, and without the doing of such acts no contract of loan can exist.

Not to repeat what has been herein said about the subscription to the stock and the application for the loan having occurred in Alabama, there is not a shadow of doubt but Denson was required to execute the note and mortgage in Alabama and on land in Alabama, deliver the same in Alabama to the agent, in Alabama, of the Association, who was appointed by the Association to do such things in Alabama. And the check for the loan was not to be delivered to Denson in Alabama, until he had executed and delivered the said instruments in Alabama to said agent of the Association in Alabama.

As the evidence shows, the Association arranged with the Alabama bank to cash the check in Alabama, which was done.

If the matters conclusively established by the evidence do not show a violation of the laws of Alabama involved in this litigation, it is impossible to conceive a state of circumstances that would amount to such violation.

As has been stated, to constitute a disregard of said laws, it is not necessary that the contract should have been concluded in Alabama.

The Supreme Court of Alabama has held invariably, that a failure to comply with the said laws, makes any transaction absolutely null and void, insufficient to convey any title or create any cause or right of action, and makes such contract unenforceable.

Sullivan vs. Fernon, 121 Ala. 393–395.

Farrier vs. New England & C. Co., 88 Ala. 275, 277, 278, 379.

State vs. Bank & Co., 108 Ala. 3–6.

Am. Un. Tel. Co. vs. Wes. Un. Tel. Co., 67 Ala. 26–30.

Smith vs. Ala. Life I. & T. Co., 4 Ala. 558.

Smith vs. Kernochan, 7 How (U. S.) 198–199.

Any conveyance or transfer of titles made on a transaction forbidden by the constitution and statutes of the

State is absolutely null and void, divests no title, confers no right, and creates no cause of action.

Stephens vs. Smith, 10 Wall (U. S.) 321.
Smith vs. Kernochan, 7 How (U. S.) 198, 199.
Thomas vs. West Jersey R. R. Co., 101 (U. S.) 71-87.
Frederick vs. Gray, 12 Kan. 518, 533.
Pettit vs. Pettit, 32 Ala. 288, 289, 308.
Swann vs. Miller, 82 Ala. 538, 540.
Clark vs. Colbert, 67 Ala. 92, 94, 95.
Robertson vs. Hayes, 83 Ala. 290.
Jemison vs. Birmingham R. R. Co. 125 Ala.

Subsequent compliance with the laws cannot relate back and give validity to a contract or transaction which at the time it was made, was null and void.

Stephens vs. Smith, 10 Wall 321-327.
Hall vs. Coxpell, 7 Wall 542-559.
Swann vs. Miller, 83 Ala. 530-540.
Pettit vs. Pettit, 32 Ala. 308.
15 Am. and Eng. Encyp. Law, (2nd Ed.) 936-942.

UNITED STATES COURTS WILL FOLLOW RULINGS OF THE STATE COURTS.

No Federal question is involved in this contention. The rights of the parties grow out of the Constitution and Statutes of Alabama. In such case the United States Courts will be governed by and will follow the rulings of the Supreme Court of Alabama, as to the construction, interpretation and application of its own laws to any given state of facts.

Such State decisions are binding on the Federal Courts and preclude them from giving a different construction, interpretation and application of said laws, although as an independent proposition the Federal Courts might differ with the State Court. The Federal Courts will construe and apply such laws as settled by the Supreme Court of the State.

The exposition given by the highest tribunals of the

State to its own Constitution and Statutes, constitute a part of the law as much as if embodied in it, and is as binding upon the Courts of the United States as the text and is conclusive on such courts.

New York Life Ins. Co. vs. Cravens, 178 U. S. 389, 395–398.

Louisiana vs. Pillsbury, 105 U. S. 294.

Leffingwell vs. Warren, 2 Black 599–603.

Erb vs. Morasch, 177 U. S. 584.

Sioux City R. R. vs. N. A. Trust Co., 173 U. S. 99, 107.

Morely vs. Lake Shore Co., 146 U. S. 162–166.

M. K. & T. R. R. vs. McCann, 174 U. S. 580–586.

If this case was tried in the State Courts of Alabama, the transaction would be condemned as null and void and unenforceable.

Farrier vs. New England Co., 88 Ala.

State vs. Bank, 108 Ala. 3–6.

Sullivan vs. Vernon, 121 Ala. 393.

The Association cannot, by coming into the Federal Court, deprive the respondent of having the case determined according to the interpretation and application given the Constitution and laws of Alabama by its own Supreme Court; with the policy of the State Legislature, the Federal Courts have nothing to do, such interpretation and construction by the Supreme Court of the State furnish the rule of decision to the Federal Courts. If equity will not relieve a complainant in the State Court, neither will it relieve it in the Federal Court.

The complainant can have only the same relief and no more, in the Courts of the United States than it could have in the State Courts.

M. L. & Trust Co. vs. Krumseiz, 172 U. S. 351, 358–359.

Iowa Ry. Co. vs. Iowa, 160 U. S. 389, 393.

Ewing vs. St. Louis, 5 Wall 413–419.

TRANSACTION UNENFORCEABLE.

The offending corporation is the actor in this litigation.

It has invoked the jurisdiction of the Court to grant it relief, and enforce this unlawful contract, made in positive violation of the Constitution and Statutes of Alabama. No court, Federal or State, sitting in Alabama will enforce such a contract.

Cooper Mfg Co. vs. Fergerson, 113 U. S. 727–737.
Gibbs vs. Gas Co., 130 U. S. 396–412.
Farrier vs. New England Co., 88 Ala. 275–279.
Dudley vs. Collier, 87 Ala. 434–435.
Lycoming Co. vs. Wright, 55 Vt. 526–534.
Clark vs. Colbert, 67 Ala. 92.
Jemison vs. R. R. Co., 125 Ala. 378, 382.
Thorne vs. Ins. Co., 21 Am. Rep. 92.
15 Am. & Eng. Encyc. Law (2nd Ed.) 997–1001.

Where the only road to recovery is by way of an illegal contract, the court will not assist the parties to the contract in traveling it. The law will not allow a right to spring from its own deliberate violation.

Tel Co vs Yopst, 3 L R A 224.
Jemison vs R R, 125 Ala 378, 383.
Mooz vs Hannon, 93 Ala 503.

There has been a purpose in some jurisdictions to limit this doctrine and apply it only in cases of *malum in se* and not to those *malum prohibitum*, but such distinction has long since been disregarded, and does not prevail in the Alabama or United States Courts.

Gibbs vs Gas Co, 130 U S 396–412.
Evans vs City of Trenton, 24 N J Law 770–771.
15 Am & Eng Encyc Law (2nd Ed) 939.
2 Bouvier's Law Dictionary, latest edition by Rawle.

PETITIONER'S CONTENTION.

The contention of the Association is, that the transaction under consideration was a contract entered into and concluded by Denson with the Association in Tennessee, and therefore the inhibitory laws of Alabama, heretofore set out in this argument, do not apply.

This contention is untenable, as it is shown in a former part of this brief the said laws of Alabama are not limited alone to the making of contracts in that State by foreign corporations, but the inhibition of said laws embrace all acts of engaging in or transacting business as defined by the Supreme Court of Alabama in their interpretation and application of said laws.

It is useless then to cite decisions from other State Supreme Courts, or from any Federal Court, pronounced on such laws, that may prevail in such jurisdiction. The decisions of Alabama Supreme Court interpreting and applying these laws to a given state of facts, are as binding on the Federal Courts, as though such interpretation and application were written in the body of such laws.

AUTHORITIES ANTE.

What acts constitute the "*engaging in or transactiug any business*" within the meaning of said laws, and what acts or transactions constitute a violation of them must be finally determined by the Supreme Court of Alabama. So binding is this doctrine and so sedulously does the United States Supreme Court guard and observe it, that they declare, "WHEN A STATUTE OF TWO STATES, EXPRESSED IN THE SAME TERMS, IF DIFFERENTLY CONSTRUED BY THEIR HIGHEST COURTS, THEY ARE TREATED BY US AS DIFFERENT LAWS, EACH EMBODYING THE PARTICULAR CONSTRUCTION OF ITS OWN STATE, AND ENFORCED IN ACCORDANCE WITH IT IN ALL CASES ARISING UNDER IT. THE RULE OF CONSTRUCTION ADOPTED BY THE HIGHEST COURT OF THE STATE CONSTRUING ITS OWN CONSTITUTION AND ONE OF THEIR OWN STATUTES IN A CASE NOT INVOLVING ANY QUESTION RE-EXAMINABLE IN THIS COURT MUST BE REGARDED AS CONCLUSIVE ON THIS COURT."

Louisiana vs. Pillsbury, 105 U. S. 204.

Provident Inst. of Boston vs. Massachusetts, 6 Wall 611, 630.

Fairfield vs. Gallatin, 100 U. S. 47.

Bauserman vs. Blunt, 147 U. S. 647, 661.

New York Life Ins. Co. vs. Cravens, 178 U. S. 389, 395 to 401.

How the Supreme Court of Alabama have interpreted and applied these laws is set forth in the following cases.

State vs. Bristol Bank, 108 Ala. 3, 6.

Farrior vs. New England Co. 88 Ala. 265, 278, 279.

Mullens vs. American Freehold & C. Co. 88 Ala. 280.

Denson vs. Chatt. Nat. B. & L. Ass'n, pp. 71, 72, 73 of the Transcript in this case.

There is no point in this case "*re-examinable*" in the United States Supreme Court, only so far as to ascertain if the decision of the Circuit Court of Appeals properly applied the decisions of the Supreme Court of Alabama.

The decisions of the Supreme Court of Alabama last above cited decide every question involved in this litigation favorable to the respondents here.

The United States Supreme Court by using the word, "*re examinable*," refer to rights arising under the Constitution and laws of the United States, and matters of general jurisprudence.

It is not profitable or available to petitioner to cite decisions of any court, State or Federal, as to the correct meaning and application of the Constitution and statutes of Alabama when the Supreme Court of that state have construed and applied such laws.

It is not necessary to analyze and discuss the decision of Judge Hammond in the case of Bedford, cited from 89 Fed. Reporter, as the whole record was carried to the United States Supreme Court and there reviewed, and that decision is cited by the petitioner here as the principal ground to reverse the decision of the Circuit Court of Appeals pronounced in this case. That case is reported as Bedford vs. Eastern B. & L. Ass'n. 181 U. S. 227.

That case affords no support to the petitioner's contention in this case. The transactions as set forth in that case upon which the court passed, were *antecedent* to the statute of Tennessee; in the case at bar the transaction was *subsequent* to the Constitution and statute of Alabama.

In the Tennessee case the *subsequent* statute violated

and impaired the obligations arising from an *antecedent* transaction, while in the case at bar, the *subsequent* transaction was in contravention and positive violation of an *antecedent* Constitution and statute of Alabama. In other words, in the Tennessee case, the statute violated the contract, while in the case at bar, the transaction violated the Constitution and statute.

The facts set forth in the first headnote of the Bedford case 181 U. S. 227, present a different question, and the facts are different from those under consideration. Before the 26th of March 1891, the day the prohibitory laws of Tennessee were enacted, Bedford had become a stockholder in the New York Association, and had made application on the 20th of March 1891, for a preference for an advance; to which he was entitled, and the advance or loan was granted subsequent to the 26th of March 1891.

It was conceded the business of the Association in Tennessee had been lawful down to the 26th of March 1891, when the prohibitory statute was passed.

The Supreme Court held, "*that Bedford's subscription to the stock of the Association, its issuance, and the application of a loan* in pursuance of it, constituted a contract, which is inviolable by the state legislature."

In the case at bar, the Constitution and statue of Alabama had been in operation for many years prior to the transaction with Denson.

They informed petitioner that doing any business in Alabama, which involved the exercise of the functions or carrying into execution of any of the powers of the corporation for which it was created and organized to engage in and carry on, without first complying with the provisions of such laws was unlawful, and that the Supreme Court of Alabama condemned all transactions as null and void without obedience to these laws, and created no right or title and gave no cause of action, and that the same could not be enforced in the courts.

These provisions of the law were as much a part of

the contract and as binding upon the petitioner, as if they had been written in the face of the contract.

Whatever their limitations were, upon the power of the petitioner to contract in Alabama, whatever their discriminations were, they became conditions of the right of the petitioner to do business in Alabama, and the consequences of the failure to conform to said laws were accepted by the petitioner.

Ignorance of the law is no excuse, as appears to be insisted on in this petition. The State prescribed the purposes of a corporation and the means of executing those purposes. Purposes and means are within the State's control. This is true as to domestic corporations. It has a broader application to foreign corporations.

What the Supreme Court of Alabama say the Constitution and statutes of the State mean, the Federal Courts will accept, whether it is declared by limiting the object of their general language, or by separating their provisions into valid and invalid parts. The Federal Courts are bound by the interpretation given these laws by the Supreme Court of Alabama.

The interests of the State must be deemed to be expressed in its laws. The public policy of the State must be deemed to be authoritatively declared by its courts. Their evidence the Federal Courts cannot oppose by views of their own. Nor can such interests and policy be changed by the contract of parties. Against them no intention will be inferred, or be permitted to be enforced.

New York Life Ins. Co. vs. Cravens, 178 U. S. 389, 395, 397 to 401.

Walters-Pierce Co. vs. Texas, 177 U. S. 28, 42 to 47.

Sullivan vs. Vernon, 121 Ala. 393, 396.

The court in the Bedford case never determined what would have been the effect on the ruling in the case, had the statute in that case been in operation before and at the time when the transaction was commenced and concluded.

That case does not determine what acts amount to engaging in or transacting any business in Alabama under

the Constitution and Statutes of that State. The Bedford case rules the subscription to the stock, the issuance thereof, and the application for a loan, constituted a contract. We have shown in a former part of this brief, that the circumstances under which the subscription to the stock, and the application for the loan, were procured, and the circumstances under which the note and mortgage were executed and delivered, the condition under which the check was to be delivered to Denson, and the circumstances under which the check was paid by the Gadsden bank, constitute the engaging in or transacting business within the purview of the Constitution and Statutes of Alabama, as interpreted and applied by the Supreme Court of Alabama.

State vs Bank, 108 Ala 3--6, and authorities there cited.

While it is not necessary to maintain the defense in this case to show the transaction is an Alabama contract, yet we insist that the transaction first assumed a binding obligation in Alabama, and therefore the contract was made in Alabama. The identical question has been determined in Alabama, in a case disclosing facts like those in this case, and the transaction held an Alabama contract.

Lindsey vs U S Sav & Loan Assn, 120 Ala 165.
Am Freehold Nal Co vs Sewell, 92 Ala 170--71.
3 Am & Eng Encyc Law (1st Ed) 547.

In the case of Equitable Life Ins. Co. vs. Clements, 140 U. S. 226--234, the court says:

"Upon this record the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri, and consequently that the policy is a Missouri contract, and granted by the laws of Missouri."

The petitioner makes two radical mistakes in its contention:

First, It insists that the laws of Alabama are not infracted unless a contract was made in Alabama.

Second, Its argument and law insisted on, are pred-

icated on the conclusions it draws from the evidence, and not on the facts themselves.

Hence none of the cases cited to support its contention are applicable to the case disclosed by the evidence.

From my reading of page 242 of the Bedford case, 181 U. S., the conclusion is fixed in my mind, that the court, *in that case*, considered the contract as made in Tennessee, and under such ruling this court will hold the contract in the case at bar as made in Alabama.

It is not conceded that it is necessary the contract should have been concluded in Alabama to condemn the transaction, and the argument here made is only in reply to that of petitioner.

The Holder case 169 U. S. 81 cited by petitioner, is not an authority for its contention. The facts of that case, show the contract was made in Ohio. See pages 91 and 92 of that case. Under the facts in the case at bar, the contract was concluded in Alabama.

Equitable Life Ins Co vs Clements 140 U S 226, 234.
New York Life Co vs Cravens 178 U S 389 395.

The statute under consideration in the Holder case, expressly provides on its face, that "all contracts made in this state, Michigan, shall be void." Prohibition was on the making of contracts, and was not leveled against "engaging in or carrying on business" as in the Alabama laws.

This fact was overlooked by the petitioner, and was not involved in any of the cases cited by petitioner. A different state of facts, and different constitution and statutes are presented in the case, from that of any case cited on petitioner's brief.

The Allgeyer case 165 U. S. 578, has no application here. That case was on a different state of facts.

On page 583 of that case it is stated by the Court, that: "It is not claimed in this suit, that the Atlantic Mutual Insurance Company has violated this provision of the Constitution by doing business in the State." The facts are not only different but the principles of law are different, from the case at bar.

Unquestionably the *contract* in the Allgeyer case was made in New York, and all that was done in the State of Louisiana was the mailing of a letter of notification, which was done after the contract had been made in New York.

The case of Sullivan vs. Sheehan 89 Fed. Rep. 247, cited by petitioner, is a strong case for respondents here.

The whole transaction took place in Chicago, and not in Minnesota. All the negotiations were had there, and all the papers were executed and delivered there. Pages 249--250 of that case.

That case on page 249, holds, "Without complying with those conditions, such foreign corporation would not have the right, by its officers or agents, to come into this State, (Minn.) and there solicit subscriptions for its stock or solicit loans."

The petitioner did this very thing in Alabama, and hence the transaction is void, and the rulings of the Supreme Court of Alabama are sustained by the Sheehan case. The Bedford case 181 U. S. 227, holds that the doing of such acts in a State constitute a contract. Guarantee Say. L. & I. Co. vs. Alexander 96 Fed. Rep. 870, on the facts therein stated has nothing to do with the case at bar.

Respectfully submitted,

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